United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1108

To be argued by
ALAN LEVINE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1108

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOHN S. DOBRANSKI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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Of Counsel.

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Preliminary Statement

John S. Dobranski appeals from a judgment of conviction entered on February 13, 1976, in the United States District Court for the Southern District of New York, after a seven-day trial before the Honorable Kevin T. Duffy, United States District Judge, and a jury.

The indictment and sentence of Dobranski are fully set forth in the Government's Brief filed as to co-defendant Dwyer at pages 1-2.

Statement of Facts

The Government's Case

The facts are set forth in the Government's Brief filed as to co-defendant Dwyer at pages 2-5.

The Defense Case

Defendant Dobranski neither testified nor offered any other evidence.

ARGUMENT

POINT I

The Court properly found that defendant Dobranski was a member of the conspiracy sufficient to admit the letters against him.

Defendant Dobranski's principal claim of error is that there was insufficient proof, independent of hearsay statements of Dwyer contained in his letters to Smith, of Dobranski's participation in the illicit transactions to find him a member of the conspiracy. Dobranski also appears to argue that the District Judge erred in failing to instruct the jury that they could only consider the hearsay statements of co-conspirators if the jury was satisfied that Dobranski's membership in the conspiracy had been proven by a fair preponderance of the non-hearsay evidence. These claims are meritless.

Once a defendant's membership in a conspiracy has been proven to the satisfaction of a District Judge by a fair preponderance of the non-hearsay evidence, the hearsay declarations of co-conspirators, in furtherance of the conspiracy, are admissible against the defendant. *Lutwak* v. *United States*, 344 U.S. 604 (1953); *Krulewitch* v. *United States*, 336 U.S. 440 (1949); *United States* v. *Glazer*, Dkt. No. S. 75-1213, 1301, slip op. 2201 (2d Cir. March 1, 1976); *United States* v. *Wiley*, 519 F.2d 1348 (2d Cir. 1975); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970); *United States* v. *Ragland*, 375 F.2d 471, 476-77 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968); Fed. R. Evid. 801(d)(2)(D), (E).

In the present case, sufficient evidence connecting defendant Dobranski to the conspiracy was shown through Dobranski's own actions on September 1, 1974 at Smith's home in Peekskill, New York. On that date Dwyer and Dobranski sold to Special Agent Kelly the weapons described in Count Three of the indictment. (GX 6 and 7). Prior to the actual payment, Dobranski, according to Special Agent Kelly, Smith and Costabile, explained how the PPSh could be opened and fired (Tr. 11, 97, 234-35), and told Agent Kelly and Smith that he and Dwyer had "run a few rounds." (Tr. 11). Thus, defendant Dobranski's own acts and statements—clearly not hearsay—linked him directly to this conspiracy to transfer firearms.

In *United States* v. *Manfredi* 488 F.2d 588, 596-597 (2d Cir. 1973), this Court held that the non-hearsay evidence sufficient to find one a member of a conspiracy may be entirely circumstantial. The evidence in this case was direct, out of the defendant's mouth, and thus, more than satisfied the appropriate legal standard. Accordingly, defendant Dwyer's statements to Smith in his letters were properly admitted by the trial court.

Defendant's additional claim that the trial court should have instructed the jury that they must find by a fair preponderance of non-hearsay testimony Dobranski's membership in the conspiracy before considering the Dwyer letters to Smith is frivolous. It is well-settled in this Circuit that the decision whether sufficient proof of membership in the conspiracy has been adduced for purposes of the admissibility of hearsay statements is for the trial court alone. *United States* v. *Ragland*, *supra*, 375 F.2d at 479. See also *United States* v. *Geaney*, *supra*, 417 F.2d at 1119.

POINT II

The proof that the weapons described in Counts Three and Four of the indictment were "firearms" within the meaning of Title 26, United States Code, Section 5848(1) was more than sufficient.

Dobranski also argues that there was insufficient evidence offered at trial to demonstrate that the weapons described in Counts Three and Four of the Indictment were "firearms" within the meaning of Title 26, United States Code, Section 5848(1). This claim is unsupported by the record.

Section 5848(1) of Title 26, United States Code * defines a "firearm" to include a "machine gun" which in Section 5848(2) is in turn defined to include a weapon which ". . . is designed to shoot, or can be readily restored to shoot, automatically more than one shot without manual reloading, by a single function of the trigger."

During the Government's case-in-chief, Gunnar Erickson, a ballistics expert with the Bureau of Alcohol, Tobacco and Firearms, testified that the 9mm. German submachine gun model MP-40, Serial No. 7284 (GX 6)

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* That subsection provides:

"Firearm. The term "firearm" means a shotgun having a barrel or barrels of less than 18 inches in length, or a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition."

and the 7.62 mm. Russian submachine gun, model PPSh, Serial No. 7090 (GX 7) were "machine guns" within the meaning of Section 5848(2) and thus, "firearms" within section 5848(1) of Title 26. (Tr. 204, 209). Mr. Erickson stated that, in this opinion, the two machine guns were both designed to shoot automatically more than one shot without manual reloading and, based on his test firing, capable of so operating. (Tr. 201-03, 205-08). Similarly, Mr. Erickson stated that the 9mm. Husqvarna Vapenfabriks A.B. with attaching shoulder-stock, Serial No. D6865 (GX 9) was a short barreled "rifle" within section 5848(3) * and, thus, a "firearm" within section 5848(1) of Title 26. (Tr. 212). As with Government Exhibits 6 and 7, Mr. Erickson testified that the rifle was designed to fire a single projectile through a rifle bore from the shoulder (Tr. 211) and that it was 20-5/8 inches in overall length, within the limit of 26 inches prescribed in the statute. (Tr. 213).

In constructing his argument to the effect that these weapons are not "firearms," Dobranski has utterly failed —as required—to give "full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact." *United States* v. *Harris*, 435 F.2d 74, 88 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971); *Curley* v. *United States*, 160 F.2d 229, 232 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). Defendant's attack on the sufficiency of the evidence on the question whether these weapons were "firearms" amounts to nothing more than an attempt to lure this Court into

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* Section 5848(3) provides:

"The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger."

sitting as a "super jury" to which counsel seeks to address an appellate summation. This Court has repeatedly declined to assume the role which Dobranski seeks to have it fill. *E.g.*, *United States* v. *Kahaner*, 317 F.2d 459, 467-68 (2d Cir. 1963), *cert. denied* as, *Corallo* v. *United States*, 375 U.S. 835 (1963). When the evidence is examined in the light most favorable to the Government—as it must be once a jury has evaluated the proof and unanimously rejected the arguments of defense counsel—*see, e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972); *United States* v. *Taddio*, 223 F.2d 759 (2d Cir.), *cert. denied*, 350 U.S. 874 (1955), it is clearly sufficient to support the jury's determination that Government exhibits 6, 7 and 9 were firearms. Indeed, it is difficult to imagine the jury arriving at any other conclusion.

POINT III

The mailing of a bullet by the informant to the defendant Dobranski does not require dismissal of the indictment.

Defendant Dobranski claims that the mailing of the bullet to him by the informant Costabile constituted governmental misconduct sufficient to require dismissal of the indictment. The Government's brief filed with respect to defendant Dwyer (at pages 26-27), on which we rely, fully demonstrates the deficiencies of this argument.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALAN LEVINE,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys, Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALAN LEVINE being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 4th day of June, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Melton Diamond, Esq
The Gate House
River Road
Highland Park, New Jersey
08904

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Alan Levine

Sworn to before me this

4th day of June, 1976

Jeanette Ann Grayer

JEANETTE ANN GRAYER
Notary Public, State of New York
No. 24-[illegible]
Qualified in Kings County
Commission Expires March 30, 1977

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William Bryan, Esq.
1400 Lawrence Road
Lawrenceville, N.J.

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JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541-75
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Commission Expires March 30, 1977